THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT

EDWARD J. RAZZABONI AND ANNE MARIE RAZZABONI

v.

RAVEN HALLE

No. 05-C-0475

ORDER

Plaintiffs have filed this negligence action for damages arising from a motor vehicle incident which occurred on or about December 16, 2003. Before the Court is plaintiffs' motion to allow expert disclosure without compliance with RSA 516:29-b. This motion asserts that the disclosure and reporting provisions of the statute, RSA 516:29-b, II & III, do not apply to treating physicians and that the statute is unconstitutional. Defendant objects.

On February 3, 2006, the Court conducted a hearing on this motion. The Court ordered at that time that the parties submit supplemental memoranda particularly addressing the legislative history of RSA 516:29-b and how federal courts, interpreting Federal Rule of Civil Procedure 26 (a)(2)(B),[1] have dealt with treating physicians. The Court has received the additional or supplemental memoranda.

[1] As discussed further in this Order, Federal Rule of Civil Procedure 26 (a)(2)(B) contains language that is substantially similar to the language of RSA 516:29-b, II.

As a preliminary matter, the Court notes that plaintiffs appear to raise the issue of the retroactive application of RSA 516:29-b to this case.[2] Plaintiffs acknowledge, however, that RSA 516:29-b does apply. See Petition of Beauregard, 151 N.H. 445, 448 (2004) ("Unlike statutes affecting substantive rights, those affecting procedural or remedial rights are usually deemed to apply retroactively to accrued cases not yet filed . . ."). Defendant, moreover, does not make any assertions to the contrary. Therefore, the Court applies RSA 516:29-b to this case.

The Court first addresses plaintiffs' arguments that the legislature's enactment of RSA 516:29-b violated the separation of powers and the rulemaking authority provisions of the New Hampshire Constitution, as well as federal and state constitutional protections pertaining to access to courts. Finding RSA 516:29-b constitutional, the Court then addresses plaintiffs' contention that the disclosure and reporting requirements set forth in RSA 516:29-b, II & III do not generally apply to treating physicians.

CONSTITUTIONALITY OF RSA 516:29-B

RSA 516:29-b, which became effective on July 16, 2004,[3] sets forth certain expert witness disclosure and reporting requirements. It provides

> I. A party in a civil case shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the New Hampshire rules of evidence.
>
> II. Except as otherwise stipulated or directed by the court, this

[2] The alleged tort occurred several months before the effective date of the statute, but this action was initiated after the effective date.
[3] The statute was amended, effective July 22, 2005, to apply only to civil cases.

> disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report signed by the witness. The report shall contain a complete statement of:
> (a) All opinions to be expressed and the basis and reasons therefore;
> (b) The data or other information considered by the witness in forming the opinions;
> (c) Any exhibits to be used as a summary of or support for the opinions;
> (d) The qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years;
> (e) The compensation to be paid for the study and testimony; and
> (f) A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years.
>
> III. These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party, within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required in accordance with the court's rules.

(Supp. 2005).

New Hampshire Superior Court Rule 35(f) also imposes expert disclosure requirements in civil matters, but these not as exacting as those called for by RSA 516:29-b. Rule 35(f) requires identification of the expert, a brief summary of the expert's qualifications, a description of the subject matter on which the expert is expected to testify, a statement or summary of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, and provision of a copy of any expert report. Unlike RSA 516:29-b, the Superior Court Rule does not expressly require that an expert prepare a written report.

Plaintiffs argue that RSA 516:29-b is unconstitutional because the legislature, in enacting this statute, has improperly invaded the province of the courts to regulate matters pertaining to the conduct of litigation, and, in so doing, has violated the separation of powers guarantee in Part I, Article 37 of the New Hampshire Constitution, and the rulemaking authority secured to the judiciary by Part II, Article 73-a. Plaintiffs contend that RSA 516:29-b is in direct conflict with and supplants New Hampshire Superior Court Rule 35(f) and that by "enactment of RSA 516:29-b the legislature is attempting to dictate to the courts and litigants before those courts the procedures that must be followed prior to offering expert testimony in a case." Pl. Mot. to Allow Expert Disclosure at ¶ 16. Plaintiffs also argue, for the first time in their supplemental memorandum, that RSA 516:29-b is unconstitutional because it impermissibly restricts access to the courts, particularly in violation of Part I, Article 14 of the New Hampshire Constitution, and also the dictates of the Federal Constitution. Defendant objects and submits that RSA 516:29-b is constitutional essentially because the ultimate authority to determine the nature of expert disclosure in a given case remains with the court.

The separation of powers doctrine of the New Hampshire Constitution guarantees

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

N.H. Const., Pt. I, Art. 37. "Despite the explicit constitutional language concerning the separation of powers in our State, . . . the doctrine does not require an

absolute division of powers, but a cooperative accommodation among the three branches of government." Opinion of the Justices (Prior Sexual Assault Evidence), 141 N.H. 562, 569 (1997) ("PSAE Opinion"). However, this overlapping of powers does not permit the legislature to overrule the judiciary in matters concerning core judicial functions or "essential operations." Id.

Thus, the separation of powers doctrine is violated when one branch of government "usurps an essential power of another." The Assoc. Press v. The State of New Hampshire, ___N.H.____ (Dec. 30, 2005) Slip. Op. at 17. In other words, "[t]he separation of powers directive 'is violated by an improper imposition upon one branch of constitutional duties belonging to another, or, an encroachment by one branch on a constitutional function of another branch of government.'" Petition of the Judicial Conduct Comm., 151 N.H. 123, 125 (2004) (citation omitted). Action by one branch of the government contravenes the separation of powers doctrine if that action "defeat[s] or materially impair[s] the inherent functions of another branch." Id. (citation omitted).

"[T]he power to control its own proceedings" is undoubtedly an essential power of the judiciary. Assoc. Press, Slip Op. at 16. Thus, any legislative action that operates to materially impair the courts' ability to perform the essential functions of maintaining effective control over, and effective regulation of, trial proceedings is an unconstitutional violation of the separation of powers doctrine of our State Constitution.

Our Supreme Court's strong concern to assure separation of powers has deep historical roots. In Merrill v. Sherburne, 1 N.H. 199 (1818), an early

nineteenth century decision, Dorothy Merrill, acting as administratrix of Benjamin Merrill, had successfully petitioned the legislature to order a new trial after the Superior Court (acting as an appellate court) had reversed the probate court's decision finding in favor of Benjamin Merrill, a request for a new trial had been denied and a final judgment had been entered. Id. at 199. In its analysis, the Supreme Court noted that the legislature's act to grant a new trial worked to "materially alter the effect of the final judgment of the court." Id. at 205. The Supreme Court held that such action constituted an unconstitutional exercise of judicial power by the legislature. Id. at 217.

Since Merrill, the New Hampshire Supreme Court has had occasion to strike down, or advise against, on separation of powers grounds, a number of other legislative measures, and, in addition, has acted to exercise and maintain judicial rulemaking authority.

In PSAE Opinion, the New Hampshire Supreme Court addressed the constitutionality of proposed legislation creating a rebuttable presumption in favor of admitting evidence of a defendant's prior or other sexual assaults in certain sexual assault-type cases. 141 N.H. at 566. The Court advised that "the bill . . . usurps the judicial function of making relevancy determinations by creating a rebuttable presumption in favor of admissibility without regard for the particular facts or circumstances of a case." Id. at 578. While the Court extensively discussed the distinction between "procedural" and "substantive" legislative enactments, id. at 569-574,[4] its holding or advise was bottomed on the conclusion

[4] This Court does not read PSAE Opinion, or any other Supreme Court precedent for that matter, as broadly establishing, without more, that the legislature may not constitutionally enact statutes

that "the proposed bill directly conflicts with . . . [New Hampshire Rule of Evidence] 404(b), a rule concerning a uniquely judicial function . . . . " Id. at 578. The Court characterized Rule 404(b) as one that "goes to the heart of the judicial function; it strikes a balance between the search for evidence that furthers the truth-finding process and the accused's rights to due process." Id. at 577. It stressed that "[t]he legislature has no more right to break down the rules prescribed by this court to assure fundamental due process in criminal and civil cases than the court has to prescribe the mode and manner in which the legislature shall perform its legislative duties." Id. at 578.

Similarly, in LaFrance, the Court held unconstitutional a statute that permitted law enforcement officers to wear firearms in the courthouses of the state. 124 N.H. at 182. There, the Court examined the traditional judicial authority over activities within the courtroom, and determined that the statute at issue worked to unduly encroach upon that authority. Id.; see also, e.g., Petition of the Judicial Conduct Comm., 151 N.H. at 126-27 (Legislature's creation of a commission to regulate the conduct of judges violates separation of powers because such commission usurped essential power of judiciary to regulate its own conduct); Petition of Mone, 143 N.H. 128, 131, 134-140 (1998) (Legislation directing that "sheriff's bailiffs shall provide adequate security in all state courts . . ." declared violative of separation of powers insofar as it required that county sheriff's personnel provide security "in those areas of New Hampshire courthouses where trials or other adjudicatory functions of the court are undertaken . . . ").

---

having to do with the judicial process that may be characterized as "procedural." See, in this regard, e.g., Richard B. McNamera, The Separation of Powers Principle and the Role of the Courts in New Hampshire, 42 N.H.B.J. 66, 81-83 (June 2001).

What these cases have in common is that in each case, a legislative measure or action was deemed, or advised to be, violative of the doctrine of separation of powers because it was considered to work to materially obstruct the court from fulfilling its constitutionally mandated essential duties.

Most recently, the Supreme Court largely upheld the constitutionality of legislation regulating access to certain court documents. Assoc. Press, Slip Op. at 15-18. In Associated Press, the Court examined the constitutionality of RSA 458:15-b, which generally provides for the confidentiality of financial affidavits filed in connection with divorce-type actions. Id. The statute under scrutiny generally designated the financial affidavits to be confidential and accessible only to specified persons, subject however, to further disclosure by court order. Id. at 1-2. Superior Court Rule 197 provided, however, at the same time that, upon written request of any party, the clerk shall seal a party's affidavit and that the affidavit may only be opened by the parties, the Office of Child Support, or with leave of court. Id. at 17. The Associated Press, and other involved news organizations, argued, among other things, that the statute violated the New Hampshire Constitution's separation of powers strictures by controlling access to court documents, and also violated the New Hampshire Constitution's rulemaking authority mandates by conflicting with a court rule on point and by conflicting "with the court's 'power to control records filed by parties in pending actions.'" Id. at 16-17.

The New Hampshire Supreme Court held, among other things, that the statute did not violate the doctrine of separation of powers because, as the Court

construed the statute, "the court retains ultimate authority over access to court records." Id. at 17. The Court also held, in finding no separation of powers violation, that the statute did not violate constitutionally protected judicial rulemaking authority because, under it, the court retained the "ultimate authority over access to records" and because "the coexistence of the statute and the rule does not create a conflict." Id.

In this case, the Court finds that while the expert witness disclosure and reporting requirements specified in RSA 516:29-b implicate the court's essential judicial power to control and regulate court proceedings, and are procedural in nature, the statute does not go so far as to usurp the court's power to effectively and completely oversee expert witness disclosure, and does not go so far as to supplant court rules. The statute acknowledges the primacy of the court's discretion, and its ultimate retention of control over the matters dealt with. RSA 516:29-b, II expressly states that its provisions are to be followed, "Except as otherwise stipulated **or directed by the court** . . . ." (emphasis added). Further, RSA 516:29-b, III states: "These disclosures shall be made at the times and in the sequence **directed by the court**," again demonstrating recognition of the court's control of these litigation-related matters. (emphasis added).

In consequence, and unlike the legislation involved in, for example, PSAE Opinion and LaFrance, nothing in the language of RSA 516:29-b operates to unduly restrict the exercise of the court's discretion in overseeing expert disclosure. Rather, the Court concludes that the legislature, by broadly deferring to the court's discretion, has acted within proper constitutional limits. The statute

does not violate the doctrine of separation of powers of Part I, Article 37 of the New Hampshire Constitution.

Further, and because the court retains the ultimate and final authority over what expert disclosure and reporting the parties must make, the statutory language does not directly conflict with, but only expands upon and adds to, the court's rule requirements pertaining to expert disclosure. The statute and Superior Court Rule 35(f) are thus not inconsistent but may operate effectively together. Accordingly, RSA 516:29-b does not violate the judicial rulemaking authority secured by Part II, Article 73-a of the New Hampshire Constitution.

Finally, and again particularly because the Court retains broad discretion over expert witness disclosure and reporting, the Court finds no merit to the plaintiffs' contention that RSA 516:29-b impermissibly impedes an individual's access to the courts for redress of harms, in violation of Part I, Article 14 of the New Hampshire Constitution or the Federal Constitution, or state or federal constitutional equal protection guarantees.. The Court notes that it has reviewed the legislative history materials the parties have provided and concludes that these do not provide real support for the position that the legislature here acted to arbitrarily establish prohibitive and unfair hurdles for pursuit of litigation. Rather, the materials show that the legislature was seeking to effect, as it saw it, efficiencies and improvements in connection with expert disclosure and reporting processes applicable generally to civil litigation.

Therefore, and for the aforementioned reasons, the Court finds that RSA 516:29-b does not offend the constitutional provisions cited by plaintiffs.

APPLICABILITY OF RSA 516:29-B TO TREATING PHYSICIANS

Plaintiffs argue that the expert disclosure and reporting requirements contained in RSA 516:29-b, II and III do not generally apply to treating physicians because treating physicians are not experts "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." Plaintiffs contend that RSA 516:29-b is based upon Federal Rule of Civil Procedure 26(a)(2) and that a majority of federal courts addressing this issue have determined that treating physicians are generally not subject to its expert reporting requirements. Defendant objects and asserts that plaintiffs will not be prejudiced by having to fully comply with the reporting requirements of RSA 516:29-b, II & III, that defendant has a right to know how plaintiffs' experts will testify at trial, and that, if this matter proceeds to trial, plaintiffs will pay their experts and thereby will be retaining them. Defendant also argues, in her supplemental memorandum, that federal courts have found that not all testimony of a treating physician is excluded from the reporting requirements of the federal rule.

The expert reporting requirements contained in RSA 516:29-b, II appear to largely mirror those contained in Federal Rules of Civil Procedure Rule 26 (a)(2)(B) ("FRCP 26 (a)(2)(B)"). Accordingly, the Court finds federal court interpretation of FRCP 26 (a)(2)(B) helpful in analyzing RSA 516:29-b, II.

Federal courts, interpreting FRCP 26 (a)(2)(B), have specifically addressed the issue of whether, or to what degree, treating physicians fall under the ambit of

the federal rule. In Sprague v. Liberty Mutual Insurance Company, the United States District Court for the District of New Hampshire (Muirhead, U.S. Magis.) noted that "[t]he majority of . . . courts in the country have concluded that Rule 26(a)(2)(B) reports are not required as a prerequisite to a treating physician expressing opinions as to causation, diagnosis, prognosis and extent of disability where they are based on treatment." 177 F.R.D. 78, 81 (D.N.H. 1998) (collecting cases); see also Rogers v. Detroit Edison, 328 F.Supp.2d 687, 689-90 (E.D. Mich. 2004) ("[A] majority of courts hold that a Rule 26(a)(2)(B) report is not required from a treating physician unless the physician will testify to matters learned outside the scope of treatment") (collecting cases). The Court in Sprague articulated the reasoning for the distinction between treating physicians and experts retained for litigation in the federal rule:

> A principle purpose of Rule 26(a)(2) is to permit a 'reasonable opportunity to prepare for effective cross examination and . . . arrange for expert testimony from other witnesses.' Fed.R.Civ.P. 26(a)(2), Advisory Committee's Notes, 1993 Amendment, ¶ 2. The unretained experts, who formed their opinions from prelitigation observation, invariably have files from which any competent trial attorney can effectively cross-examine. The retained expert . . . has no such files and thus is required to provide the report to enable effective cross-examination. This reading puts unretained experts, because of their historical file, and retained experts, because of the required report, on equal footing for cross[-] examination purposes.

177 F.R.D. at 81. However, the Court in Sprague held that to the extent the treating physician was actually retained to provide testimony, counsel must comply with the reporting requirements. Id.; see also Hawkins v. Graceland, 210 F.R.D. 210, 211 (W.D. Tenn. 2002) (Noting that "the application of the Rule 26 disclosure requirements depends on the substance of the treating physician's testimony

rather than his or her status"). The Court in Sprague also noted that "an expert who is not retained or specially employed is not subject to Rule 26(a)(2)(B)'s reporting requirements just because he is paid for his time to testify." 177 F.R.D. at 81.

Here, the plain language of RSA 516:29-b, II states that the disclosure and reporting provisions apply only "with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." The Court construes this language to not encompass treating physicians who testify regarding matters reasonably flowing from the treatment. The Court finds persuasive the reasoning of the federal courts, that have interpreted similar language in the federal rule, and have determined that the requirements of a report, similar to the requirements in RSA 516:29-b, II, generally do not apply to an individual's treating physician. The Court agrees with the reasoning in Sprague with respect to its distinction between treating physicians and retained experts in the context of pretrial expert discovery reports.

Therefore, plaintiffs are not required to meet the disclosure and reporting requirements contained in RSA 516:29-b, II to the extent that plaintiffs' experts will testify as to matters as to which "the source of the facts which form the basis for a treating physician's opinions derive from information learned during the actual treatment of the patient." Hawkins, 210 F.R.D. at 211 (citing Sullivan v. Glock, Inc., 175 F.R.D. 497, 501 (D.Md. 1997)). The aforementioned testimony includes such matters as causation, diagnosis, prognosis, and extent of disability.

However, as to any experts who are specially retained to provide testimony at trial, or to the extent that a treating physician's testimony will exceed matters reasonably flowing from treatment, plaintiffs are subject to the disclosure and reporting requirements of RSA 516:29-b, II. Accordingly, consistent with the foregoing analysis, plaintiffs' motion to allow expert disclosure without compliance with RSA 516:29-b is, in part, GRANTED, and, in part, DENIED.

SO ORDERED.

Date: _____5/16/06_____ _____

John M. Lewis
Presiding Justice